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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1341

WESLEY MERRITT, aka WESLEY MERRITT, JR. and
JOHN WESLEY MERRITT,
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

CHARLES RAYMOND SMITH
HOSEA ALEXANDER STEPHENS
2334 National Bank of Georgia Building
Atlanta, Georgia 30303
Attorneys for Petitioner

BRACKETT, ARNALL & STEPHENS
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Prayer	1
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	4
Reasons for granting the writ	11
Conclusion	18
Appendix A—Opinion of U. S. Court of Appeals for the Fifth Circuit	A-1
Appendix B—Judgment of the Court of Appeals	A-3
Appendix C—Order denying petition for rehearing	A-4

Cases Cited

Bodoglau v. Commissioner of Internal Revenue, 7 Cir., 230 F.2d 336	17
Bryan v. United States, 5 Cir., 175 F.2d 223	16
Fuller v. Commissioner of Internal Revenue, 6 Cir., 313 F. 2d 73	16
Grubb v. Commissioner of Internal Revenue, 6 Cir., 315 F. 2d 753	16
Holland v. United States, 348 U.S. 121	2, 11, 14, 16
Merritt v. Commissioner of Internal Revenue, 5 Cir., 301 F.2d 484	15

Meyers v. United States (Ct.Cl.), 134 F. Supp. 520 15

Phillips' Estate v. Commissioner of Internal Revenue, 5 Cir., 246 F.2d 209 15

Schwarzkopf v. Commissioner of Internal Revenue, 3 Cir., 246 F. 2d 731 12

United States v. Costello, 2 Cir., 221 F.2d 668 (aff'd on other grounds 350 U. S. 359) 18

United States v. Fenwick, 7 Cir., 177 F.2d 488 16

United States v. Healy, 376 U.S. 75, 11 L.Ed. 2d 527, 84 S.Ct. 553 2

United States v. Mitchell, 7 Cir., 413 F.2d 181 16

Statutes Cited

26 U.S.C. § 165(e) 2, 9, 12, 16, 17

26 U.S.C. § 7201 .....2, 3, 4

28 U.S.C. § 1254(1) 2

Revenue Ruling Cited

Revenue Ruling 45-219, Internal Revenue Bulletin 1954-1 3

Texts Cited

Balter, Tax Fraud and Evasion (3rd Ed.), § 10.4-11 12

Mertens, Law of Federal Income Taxation, Vol. 10, § 55.. 14

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Wesley Merritt, aka Wesley Merritt, Jr., and John Wesley Merritt, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case January 21, 1975. A petition for rehearing was denied March 25, 1975.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix I.

JURISDICTION

The judgment of the Court of Appeals was entered January 21, 1975. Petition for rehearing was denied March 25, 1975. This application is being filed within thirty (30) days from the date of denial of the petition for rehearing. [*United States* v. *Healy*, 376 U.S. 75, 11 L.Ed. 2d 527, 84 S.Ct. 553.]

Jurisdiction to issue the writ is invoked pursuant to the provisions of *Title 28, Section 1254(1), United States Code.*

Petitioner was convicted in the United States District Court for the Northern District of Georgia on three counts of a five count indictment charging him with violations of *Title 26, Section 7201, United States Code.*

QUESTIONS PRESENTED

I. In a prosecution for evasion of income taxes [*Title 26, Section 7201, United States Code*] utilizing the increase in net worth method of proof, does this Court's decision in *Holland* v. *United States*, 348 U.S. 121, require inclusion in opening net worth of some amount of cash?

II. Under this Court's decision in *Holland* v. *United States*, 348 U.S. 121, does the United States establish a satisfactory opening net worth in a prosecution for evasion of income taxes [*Title 26, Section 7201, United States Code*] without including some amount of cash?

III. Does *Section 165(e), Title 26, United States Code*, which provides theft losses are deductible only in the year when such theft is discovered, have any applicability to a prosecution for evasion of income taxes [*Title 26, Section 7201, United States Code*] utilizing the increase in net worth method of proof?

STATUTES INVOLVED

Title 26, Section 7201, United States Code, provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Title 26, Section 165, United States Code, insofar as here pertinent, provides:

> "(a) **General Rule—**
>
> There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise."
>
> * * * * * * *
>
> "(e) **Theft Losses—**
>
> For purposes of subsection (a), any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss."
>
> * * * * * * *

Revenue Ruling 45-219, Internal Revenue Bulletin 1954-1, Page 51 provides:

> "The Federal excise tax on wagers under Section 3285 (d) of Internal Revenue Code, and the special tax under Section 3290 of the Code, paid by persons engaged in receiving wagers are deductible for Federal income tax purposes as ordinary and necessary business expenses under Section 23(a) of the Internal Revenue Code, provided the taxpayer is engaged in the business of accepting wagers or

conducting wagering pools or lotteries or is engaged in receiving wagers for or on behalf of any person liable for the tax under Section 3285(d) of the Code."

STATEMENT OF THE CASE

(a)

The Indictment

The indictment contained five counts all charging violation of *Section 7201, Title 26, United States Code*, in the filing of false and fraudulent income tax returns for the calendar years 1965 through 1969, viz:

Count	Year	Amount Reported	Tax Paid	Alleged Correct Income	Alleged Tax Due
One	1965	$11,550.00	$ 2,160.00	$ 45,422.11	$ 14,771.06
Two	1966	8,996.62	1,504.76	44,247.71	14,089.36
Three	1967	12,317.78	2,339.45	112,743.59	53,043.52
Four	1968	51,741.61	19,276.00	152,982.63	84,803.30
Five	1969	21,345.33	5,291.50	258,425.36	167,007.46

The jury returned a verdict of not guilty on counts one and two, but guilty on counts three, four and five.

(b)

Bill of Particulars

The District Court granted defendant's Motion for a Bill of Particulars which the Government furnished, and amended as to two years on the eve of trial, viz:

a] Informing that the increase in net worth plus non-deductible expenditures method of proof would be utilized;

b] Stating the dollar amounts its proof would show as defendant's alleged net worth for the five indictment years and three prior years; and

c] Identifying the alleged likely sources of unreported income received by defendant to be rentals, interest, dividends, capital gains, and operation of a lottery in Fulton County, Georgia.

The Bill of Particulars as amended alleged the Government would establish defendant's net worth as of December 31 in each of the calendar years to be, viz:

Year	Net Worth
1964	$ 38,164.97
1965	87,180.30
1966	136,078.57
1967	248,435.06
1968	497,130.31
1969	736,159.99

(c)

Investigation

In July, 1970 Charles W. Maxwell, a special agent with the Intelligence Division, IRS, Atlanta, was assigned to interview Petitioner. According to Maxwell, on this occasion Petitioner stated neither he, his wife, nor any members of his family had ever received any type of inheritance, nor had he ever received any gift in excess of $500.00. He further stated he never maintained any substantial amount of currency because when he earned it he immediately invested it. As to whether he had any currency not on deposit December 31st of each year 1964

through 1969, he stated he could not remember how much currency he had at that point, and then declined to say if he had as much as $2000. When asked if he was in the lottery business he terminated the interview.

The case was thereafter assigned to Special Agent Wilbur R. Calhoun, who occupied the status of case agent.

(d)

Case Agent's Opening Net Worth

Under cross-examination, Calhoun testified that at the time of his final report he had determined net worth, viz:

Year Ending	Assets	Liabilities	Net Worth
Dec. 31, 1964	$ 55,880.95	$17,715.98	$38,164.97
Dec. 31, 1965	104,944.98	17,764.54	87,180.30

In neither of the foregoing, nor any subsequent tax years through 1969, did Calhoun include **any** cash on hand. Witness justified this omission by saying "any figure I would have used would have been arbitrary." He had determined the existence of several safe deposit boxes, and also the existence of an assessment for wagering taxes made against defendant and others for the period May through December, 1964 (Government's Exhibit 34-135) for more than $53,000.

Although Agent Calhoun established the tax on wagers to be $31,000, and the remainder penalties, which would represent 10% tax on $310,000 of gross wagers, he did not discuss with the Excise Tax Division of IRS to determine this as a potential indicia of cash on hand, nor did he include any cash on hand in his report from this source since "it would be indicative there would be cash on hand at the end of each year following this . . . which would . . . negate any increases".

In placing cash on hand at zero, Calhoun stated he relied heavily on defendant's statements to Special Agent Maxwell that he managed to invest his cash before he accumulated any sums. However, witness admitted he was aware defendant had refused to state any specific amount of cash on hand as of any specific time or that he had as much as $2,000 cash on December 31 of the years 1964 through 1969.

In like manner, the wagering tax lien of $53,000 was not included as a liability in any of these years, although the lien was still outstanding at the time of trial. Witness again justified this omission to so include the liability "because it would have no effect on it".

(e)

Summary of Government's Evidence

Employing a technique now much in vogue in income tax prosecutions, the Government utilized as an expert Luther Milton Britt, an employee of IRS [who characterized himself "a Narcotics Agent in the Field Audit Division of the Atlanta District, Internal Revenue Service"] to summarize the voluminous evidence which had been introduced, explain summaries prepared by him, and testify categorically to what had been established as net worth, assets, liabilities, income, and amount of tax liability for each of the indictment years.

Two summaries were presented by Mr. Britt, neither being admitted in evidence. After testifying for a full day from the first summary, errors some of which were developed by cross-examination were discovered. A second summary was prepared, in which Mr. Britt admitted 133 figures had been changed, and was presented.

In the two summations, Mr. Britt established Petitioner's net worth, viz:

End of Calendar Year	First Summary	Second Summary
1964	$ 49,164.82	$ 48,952.32
1965	32,185.41	32,340.93
1966	63,238.51	63,076.01
1967	161,831.45	162,172.19
1968	399,585.96	398,408.27
1969	617,343.73	613,205.01

As in the instance of Special Agent Calhoun, Britt placed cash on hand at zero in the opening net worth, and ascribed zero value to restaurants and lounges. Cash on hand first appeared in the calculation in the amount of $90,000.00 for the year 1968. Although defendant's net worth for the year 1965 declined from $48,952.32 as of December 31, 1964 to $32,340.93 as of December 31, 1965—a decrease [or as characterized by Britt a "Negative increase"] of $16,611.39—the corrected adjusted gross income for the year 1965 was established at $36,462.85 resulting in alleged taxable income for 1965 of $20,468.53. This was accomplished by *adding back as though it were an asset* the wagering tax liability assessed against defendant and others of $53,267.47.

Britt justified this action by saying the charge-back was necessary because the defendant had not paid the wagering taxes, and wagering taxes were not deductible for income tax purposes any way. When confronted with Revenue Ruling 45-219, Britt stated he had been with IRS for seven years and never heard of it.

Evidence had been introduced that Petitioner in the year 1969 delivered $105,000 to Joel C. Stokes, an officer of Citizens Trust Company, Atlanta, Georgia, for the purpose of participating with the Bank in a loan to one Mendel Romm. At the time

of Petitioner's trial Stokes, who was then serving a sentence for misapplication of bank funds and embezzlement, was called by the Government as a witness. It was developed from cross-examination of Stokes, and by independent evidence, that the IRS was asserting a deficiency against Stokes based on his embezzlement of the funds delivered by Petitioner to him.

It appeared that Petitioner did not become aware his funds were missing until 1970, and that he then instituted a civil action against Citizens Trust Company, Stokes, and others, to recover his funds. A reduction in net worth for the year 1969 was not allowed in Britt's computations which he justified by saying the $105,000 under Stokes' testimony was not embezzled but used in a subsequent year to purchase the Seven Court Apartments in Atlanta, and the notice of deficiency against Stokes did not represent a final position by IRS anyway.

The Government requested, and the Court over timely exception and objection of Petitioner gave, an instruction to the jury embodying *Section 165(e), Title 26, United States Code.*

Defendant, testifying as a witness in his own behalf, stated that commencing in about 1953 he engaged in bootlegging and a lottery operation, interrupted by service of a sentence imposed in the Northern District of Georgia from the middle of 1961 to February 22, 1962, upon release from which he resumed the same business.

As of January 1, 1965 he had accumulated around $320,000 or $330,000 in cash which was hid under the house, under the floor furnace, at 954 Smith Street, Atlanta, where he then resided, and when he moved to his present place of residence on Baker Ridge Drive he carried this money with him and buried it at various spots in the yard.

Two paper bags, containing damaged currency, were placed in evidence and which Petitioner identified as money that was laying to the ground. On January 31, 1969 a search warrant

was executed by William W. Gable, a police officer of the City of Atlanta, at Petitioner's residence on Baker Ridge Drive and $31,496.50 was found in paper bags located under some concrete steps in the basement, and between the ceiling tile and first floor of the house.

A representative of the Federal Reserve Bank of Atlanta, called by the Government in rebuttal, stated he had checked the serial numbers on eight bills contained in one of the bags placed in evidence by Petitioner and none of the eight were in circulation on December 31, 1964 all having been placed in circulation at later dates. This witness admitted the bills in both bags were in bad condition, possibly could have been buried in the ground, and that one specific bill was of different texture and firmer to touch.

A Motion for Judgment of Acquittal, made at the conclusion of all of the evidence, was after rather extensive argument overruled by the Court. The District Judge, however, did raise with Government counsel the question of sufficiency of proof of the opening net worth and, in the words of the Court, "what evidence do you have that there was no cash hoard at all?" Further in the course of the argument, the Court stated to Government counsel:

> "Let's suppose he's lying. Let's suppose the jury believes he's lying. That doesn't help you a particle if you haven't proved his opening net worth."

At the time of sentencing, and by way of disposition of post-verdict Motion for Judgment of Acquittal and in the alternative for a new trial the District Judge stated:

> "Well, there's some things in this case I didn't understand at the time of trial, and I don't know that I understand them yet; but I made rulings on them at the time of trial, and I'm going to adhere to them now and, therefore, I will overrule those motions."

REASONS FOR GRANTING THE WRIT

I. In *Holland* v. *United States*, 348 U. S. 121, this Honorable Court announced a basic guideline for prosecutions of income tax evasion cases utilizing the increase in net worth method of proof to consist of

> ". . . the establishment with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset."

This guideline is not being adhered to by the Government in this type case, and particularly was not adhered to in the case of Petitioner since in undertaking to establish a net worth for Petitioner on December 31, 1964

a] Cash on hand was placed at zero, and no cash on hand was included as an asset until the year 1968 when $90,000 was introduced into the computations;

b] Three small restaurants and lounges were likewise valued at zero;

c] A wagering tax assessment of $34,165.58, made against Petitioner and others by the IRS for ten months of the year 1964 was ignored as a potential indicia of cash on hand.

II. This Honorable Court in *Holland* v. *United States*, 348 U. S. 121, having in terms stated that an opening net worth in a prosecution for income tax evasion utilizing such method of proof should include all assets of the taxpayer, failure to

take into account some amount of cash as an asset amounts to a failure of proof when the net worth method is utilized by the Government.

III. Net worth being the difference between what one *owns* and what one *owes* at any given time, the provisions of *Title 26, Section 165 (e), United States Code,* have no applicability to a prosection for income tax evasion utilizing the net worth method of proof, and this Honorable Court should so hold since the Government is requesting that this principle be given in charge to the jury and in the instant case the District Judge gave the principle in charge as requested.

I

Holland Guidelines Not Adhered To

The decision of this Honorable Court in *Holland* v. *United States,* 348 U. S. 121, has been characterized as "the fons et origo of the law concerning the use of the net worth method of income reconstruction" [*Schwarzkopf* v. *Commissioner of Internal Revenue,* 3 Cir., 246 F. 2d 731, 733]. The method of proof thereby sanctioned has been termed "at its best an approximation and at its worst an abomination" [*Balter, Tax Fraud and Evasion* (3d Ed.), § 10.4-11, page 10.51].

A period of twenty years has now intervened since *Holland* was decided, and Petitioner submits that such holding should be re-examined in the light of its potentiality for abuse. A person can be charged with the offense of income tax evasion, the increase in net worth method employed, his case tried on approximations as though it were a civil deficiency action, and be found guilty because of inability to produce explanations.

"Inclusion in this sum of all assets on hand at the outset" [*Holland,* p. 132] is not met by prosecutive action which, as in the case of Petitioner

a] Placed cash on hand at zero for each of the years 1964, 1965, 1966, and 1967;

b] Introduced cash on hand [not cash in banks] as an asset for the first time in the year 1968 in the amount of $90,000;

c] Valued restaurants and lounges at zero, contending this has no effect on net worth since the zero balance was maintained through December 31, 1969, the final year of the prosecutive period; and

d] Ignored a wagering tax assessment of $34,165.58 in 1964 as a potential indicia of the presence of cash accumulation in a substantial amount.

The case agent, while stating categorically that he relied heavily upon the statement ascribed to Petitioner by Special Agent Maxwell, i.e., "that he didn't have any cash on hand at any time, that he managed to invest his cash before he accumulated any sums," nevertheless disregarded the counterpart of such statement in which Maxwell related Petitioner told him he could not remember how much currency he had on December 31 of the years 1964 through 1969, and when asked if he had as much as $2,000, said he would rather not answer that question.

Likewise, the case agent admitted he ascertained the existence of several safe deposit boxes and, although in the bill of particulars furnished by the government lottery was listed as a potential source of income, stated he saw no need to discuss with the Excise Tax Division of IRS the assessment made in 1965 for 10 months of 1964 in the amount of $34,165.58 as 10% on wagers determined by the Excise Tax Division to have been accepted by Petitioner and others in order to determine whether Petitioner had any cash on hand at December 31, 1964.

Failure of the taxpayer during an investigation to furnish leads does not shift the burden of proof in a criminal prosecution. By the same token neither does it relieve Internal Revenue Agents from pursuing leads developed by their own investigation. *Mertens, Law of Federal Income Taxation,* Vol. 10, § 55, A. 27a, p. 226 states:

> "This requirement [opening net worth] includes the listing or accounting for all assets of the taxpayer of which the Government is aware, *either through its own investigation* or through the checking of leads furnished by the taxpayer." [Emphasis supplied.]

The results testified to by the Case Agent of the determinations made by him at the time of his final report with respect to Petitioner's net worth should themselves have been an indication to the agent that substantial cash had existed, viz:

Year	Assets	Liabilities	Net Worth
1964	$ 55,880.95	$17,715.98	$38,164.97
1965	104,944.98	17,764.54	87,180.30

Thus, in a period of twelve months, while assets increased $49,063.89 liabilities increased less than $50.00—a result which is hardly credible except for the existence of cash.

II

Inclusion of Some Cash on Hand Is Required

Examination of the reported decision in *Holland* v. *United States,* supra, reveals that the investigating agents there included $2,153.09 cash on hand and did not, as was done here, place same at zero. While this Honorable Court did not in express terms spell out the presence of cash on hand as a sine qua non, Petitioner submits such is inherent in the holding. Research

indicates that not only the Courts of Appeal but also the Tax Court and the Court of Claims have emphasized that "cash on hand" is important to the accuracy of an opening net worth.

Meyers v. *United States* (Ct.Cl.), 134 F. Supp. 520, 523 contains the following statement:

> "The most important part of a net worth computation is the beginning of a net worth and the most important part of that is the *cash on hand.*" [Emphasis supplied.]

That "cash on hand" is not limited to deposits in a checking or savings account in some financial institution appears from language of the Fifth Circuit Court of Appeals in a previous case of *Merritt* v. *Commissioner of Internal Revenue*, 5 Cir., 301 F.2d 484:

> ". . . a net worth computation must include, as an opening figure . . . *whatever coin and currency* there might be in the taxpayer's possession." [Emphasis supplied.]

Another decision by the Fifth Circuit Court of Appeals and which is considered somewhat a landmark holding in this area, is *Phillips' Estate* v. *Commissioner of Internal Revenue*, 5 Cir., 246 F.2d 209. Petitioner begs leave to quote therefrom in extenso for the ready reference (p. 213):

> "In establishing that opening net worth all types of assets (less liabilities) are included. Perhaps from a conceptual point of view, cash stands no differently than other property. But the history of these cases and human experience generally compels a recognition that cash is different. From ignorance, apprehension of bank deposits, furtive desire to conceal gains, ill-gotten or belonging to others, the sometimes irresistible response to the appeal of miserly greed or a variety of other reasons grounded in the every-

day experience of mankind, people do hoard cash. Physically, in contrast to other accumulations, it is easy to hoard and with some reasonable security. And, negotiable as it is by the simple act of delivery, when spent, unlike checks or drafts, it leaves no telling prints to track from whence it came."

A substantial body of decisions exist which are in accord with the foregoing, viz: *Fuller* v. *Commisisoner of Internal Revenue*, 6 Cir., 313 F.2d 73, 77; *United States* v. *Mitchell*, 7 Cir., 413 F.2d 181, 184; *Bryan* v. *United States*, 5 Cir., 175 F.2d 223; *United States* v. *Fenwick*, 7 Cir., 177 F.2d 488; and *Grubb* v. *Commissioner of Internal Revenue*, 6 Cir., 315 F.2d 753, and which list is by no means exhaustive.

III

Time of Discovery of Theft Loss Has No Applicability to a Net Worth Case

The District Court, on request by the Government and over objections and timely exception of Petitioner, charged the jury the substance of *Section 165(e), Title 26, United States Code*, that

> ". . . theft losses by a taxpayer are deductible only in the year when such theft is discovered."

This instruction is inappropriate in a net worth case, and this Honorable Court should so establish. It could be appropriate *only* in a prosecution proceeding on the omission of specific items of income.

Bearing in mind this Honorable Court's admonition in *Holland*, supra (p. 125), with respect to the net worth method of proof

". . . it is so fraught with danger for the innocent that the courts must closely scrutinize its use"

certainly the Government should not be permitted to utilize inappropriate sections of the Internal Revenue Code to achieve the ends sought.

If net worth represents the sum total of assets minus liabilities, or stated another way, the difference between what one *owns* and what one *owes* at any given time, then Section 165(e) of Title 26, USC, can have no application whatever to a prosecution utilizing the net worth method of proof. If $105,000 was embezzled from Petitioner in the year 1969 [as the action of IRS in asserting deficiency against Joel C. Stokes based thereon would certainly seem to indicate] then Petitioner's assets at the end of the year 1969 were $105,000 less than the amount claimed by the Government.

Net worth does not consist in the difference between what one *thinks one owns* and what one *owes* at any given time. Compare *Bodoglau* v. *Commissioner of Internal Revenue*, 7 Cir., 230 F.2d 336, holding Section 23(h), Title 26, United States Code, has no application to a net worth case.

CONCLUSION

Finally, Petitioner invites attention to *United States* v. *Costello*, 2 Cir., 221 F.2d 668 [aff'd on other grounds 350 U. S. 359], in which after carefully analyzing the Government's proof Judge Learned Hand stated:

> "Considering the admonition with which the Supreme Court has hedged about the 'net worth method,' we cannot therefore agree that the evidence, taken as a whole, justifies the inference that he had no reserve on January 1, 1946."

Respectfully submitted

CHARLES RAYMOND SMITH
HOSEA ALEXANDER STEPHENS
2334 National Bank of Georgia Building
Atlanta, Georgia 30303
Attorneys for Petitioner

BRACKETT, ARNALL & STEPHENS
Of Counsel

APPENDIX

APPENDIX A

In the United States Court of Appeals
For the Fifth Circuit

No. 74-2199

United States of America,
Plaintiff-Appellee,

vs.

Wesley Merritt, aka Wesley Merritt, Jr. and
John Wesley Merritt,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

(January 21, 1975)

Before Brown, Chief Judge, and Murrah* and Wisdom, Circuit Judges.

Per Curiam: Affirmed. See Local Rule 21.[1] Merritt was convicted by a jury on three counts of income tax evasion for having failed to report more than $464,000 of taxable income for the years 1967 to 1969 in violation of 26 U.S.C. § 7201. He appeals on four grounds: (1) that there was insufficient evidence to establish a starting point for reconstruction of his income by the net worth method, (2) that there was a fatal variance between

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* Senior Circuit Judge of the Tenth Circuit, sitting by designation.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

the net worth figures alleged in the bill of particulars and those proved at trial, (3) that the trial judge erred in a jury instruction regarding the deductibility of theft losses, and (4) that a new trial should have been granted because of remarks the trial judge made regarding the complexity of the case after the jury had returned its verdict. After a thorough review of the facts and the law, we have found these arguments to be uniformly without merit. See Holland v. United States, 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150; United States v. Ragen, 1942, 314 U.S. 513, 62 S.Ct. 374, 86 L.Ed. 383. We affirm.

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

October Term, 1974

No. 74-2199

D. C. Docket No. CR-27,964

United States of America,
Plaintiff-Appellee,

versus

Wesley Merritt, aka Wesley Merritt, Jr. and
John Wesley Merritt,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

Before Brown, Chief Judge, and Murrah,* and Wisdom, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 21, 1975

Issued as Mandate.

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* Senior Circuit Judge of the Tenth Circuit, sitting by designation.

APPENDIX C

In the United States Court of Appeals
For the Fifth Circuit

No. 74-2199

United States of America,
Plaintiff-Appellee,

versus

Wesley Merritt, a/k/a Wesley Merritt, Jr. and
John Wesley Merritt,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

On Petition for Rehearing

(Filed March 25, 1975)

Before Brown, Chief Judge, Murrah and Wisdom, Circuit Judges.

Per Curiam:

It Is Ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1341

WESLEY MERRITT, A/K/A WESLEY MERRITT, JR. AND JOHN WESLEY MERRITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on three counts of willfully attempting to evade and defeat his income tax for the years 1967, 1968, and 1969, in violation of 26 U.S.C. 7201.[1] He was sentenced to five years' imprisonment and a $5,000 fine on each of the three counts. However, the court suspended the execution of the sentence of imprisonment and placed petitioner on probation with respect to the second count and directed that the sentence of imprisonment with respect to the third count run concurrently with the sentence on the first count (App. 943-944).[2]

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[1]The indictment also charged petitioner with tax evasion for the years 1965 and 1966, but the jury acquitted as to those years.

[2]"App." refers to the appendix filed in the court of appeals.

Petitioner contends (Pet. 8) that the government's proof failed to establish a satisfactory starting point for the computation of unreported income by the net worth method. The evidence presented at trial, however, effectively refutes petitioner's contention.

The proof showed that petitioner furnished the Treasury agents no books or records from which his income could be computed; that the agents conducted an exhaustive investigation into his financial affairs and reconstructed his income by use of the net worth method; that this reconstruction proved that petitioner had realized unreported taxable income during the years 1967 through 1969 in excess of $464,000; that petitioner concealed more than 90 percent of his income tax liability for those three years, reporting less than $27,000 when the correct figure was well in excess of $300,000; that it was petitioner's practice to invest funds in the names of other persons and to deal in cashiers' checks and in large sums of currency; that the great bulk of petitioner's income arose from the operation of a lottery (numbers game) during the prosecution years; and that he was actually convicted in 1969 of conducting a lottery (App. 150-152, 414-421, 437-438, 626-627; V-R.3, 12-14, 96-100, 106-120, 136; X-R. 48-49).[3]

During the investigation, petitioner admitted to the agents that neither he, his wife, nor any members of his immediate family had ever received any type of inheritance and that he could not recall ever having received a gift in excess of $500 (App. 22). Petitioner also stated that during the years 1964 through 1969 he had not kept any substantial sums of currency on hand because when he earned it he immediately invested it (App. 22-23). He filed no income tax returns for the years 1956 through 1963 (II-R. 23, 24, 26).

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[3]"R." refers to the original record on appeal.

At trial, petitioner claimed for the first time that at the starting point of the government's net worth analysis (December 31, 1964), he had between $320,000 and $330,000 of undeposited cash on hand (App. 711), which, if true, would have accounted for most of the unreported funds claimed by the government to be income. But petitioner admitted that this money, most of which he claimed was earned between 1960 and 1964 (App. 749, 759), had never been reported on his income tax returns (App. 754). The jury was accordingly presented with the question whether petitioner was telling the truth in 1970, when he talked to the Treasury agents, or at the time of trial.

Petitioner's trial position was undermined by the fact that during the years when he was supposedly accumulating this money, he did not file income tax returns; that he lived in a rather poor neighborhood until 1966, when he moved to a substantially better one (App. 418); and that some of the bills he brought into court with the claim that they had been buried in the ground since 1964 were bills that did not exist until later dates (App. 767-768, 842, 850-852). With petitioner's trial testimony thus discredited before the jury, and with the government's proof of corroborated admissions by petitioner of no substantial cash on hand at the starting point (*United States* v. *Calderon*, 348 U.S. 160, 165-167; *Smith* v. *United States*, 348 U.S. 147, 157-159), there was a solid case for submission to the jury.

Of course, the government's failure to credit petitioner with any cash on hand at the starting point did not mean that he had no cash whatsoever, but only that there was no way to determine the precise amount of cash. In any event, it was clear that petitioner could not have had enough cash on hand to have affected the result of the net worth analy-

sis.[4] Moreover, when the jury found petitioner not guilty for the years 1965 and 1966—the years where the government's reconstruction showed unreported income of more than $37,000 (App. 626)—it may have had a reasonable doubt as to the cash on hand at the beginning of those years. But its return of guilty verdicts as to 1967, 1968, and 1969 showed that it had no such doubt as to those years.[5]

Thus, in light of the foregoing evidence, the starting point net worth was established with "reasonable certainty," *Holland* v. *United States*, 348 U.S. 121, 132, and the case was properly submitted to the jury for its resolution of the credibility of petitioner's belated claims of a large cash hoard at the starting point.

Petitioner further contends (Pet. 16-17) that the trial court erred in charging the jury that theft losses by a taxpayer are deductible only in the year when such theft is discovered. Such charge was a correct statement of the law (see Section 165(e) of the Internal Revenue Code of 1954 (26 U.S.C.)). Here, petitioner stated in a deposition taken in 1972 that he made no claim as to any mishandling of the $105,000 by the bank employee Stokes and admitted that he had received a full accounting for it (XVI-R. 75-76). However, at trial, petitioner took the position that Stokes embezzled the $105,000 from petitioner in 1969, and that therefore there was a loss offsetting the $105,000 cash on hand included in the government's net worth reconstruction (App. 699-701).

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[4]As petitioner points out (Pet. 8, 11), a $90,000 cash on hand item was included in the government's reconstruction of petitioner's net worth as of December 31, 1968. However, that item, like the $105,000 item of cash on hand as of December 31, 1969 (App. 590), was supported by proof consisting of a deposition taken from petitioner in other proceedings and the trial testimony of Joel Stokes, a bank employee who was the custodian of the funds (see III-R. 39-56, 62-64, 67-74; XI-R. 46 *et seq.*, 82 *et seq.*). (See App. 68-84, 90-93.)

[5]While it is true, as petitioner contends (Pet. 13), that certain restaurants and lounges were shown on the government's net worth analysis at zero valuation because the government was unable to prove the cost of these assets, they were carried as zero throughout the prosecution years and thus had no effect on the net worth increases.

If such a loss were credited to petitioner in the year 1969, by omitting the $105,000 item from his closing net worth for that year, it would have reduced his alleged unreported income by $105,000. But if the loss was not deductible until it was discovered, there would have been no need for the jury to consider the possible elimination of the $105,000 item because there was no evidence that petitioner discovered the alleged loss by 1969. In view of the position taken by petitioner at trial, that the purported embezzlement occurred in 1969, the trial court's instruction that embezzlement losses are deductible only in the year of discovery was necessary for the jury's guidance.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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